

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES**

Application No. **09/803,667**
Inventor: David S. MILLER
Confirmation No. 9714
Filing Date: March 12, 2001
Title FULLY-AUTOMATED SYSTEM FOR TAX REPORTING, PAYMENT
AND REFUND AND SYSTEM FOR ACCESSING TAX
INFORMATION
Examiner Susanna M. DIAZ
Art Unit 3692
Attorney Docket No. 31921-169499
Customer No. **26694**

REPLY BRIEF

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Sir:

In response to the Examiner's Answer mailed August 6, 2008, Appellant timely submits herewith a Reply Brief in accordance with 37 C.F.R. § 41.41. The Notice of Appeal was filed on October 22, 2007, in accordance with 37 C.F.R. § 41.31(a)(3); the Appeal Brief was timely filed on May 22, 2008, in accordance with 37 C.F.R. § 41.37. A Request for Oral Hearing under 37 C.F.R. § 41.47(b) is being submitted herewith as well as the required small entity fee of \$540 pursuant to 37 C.F.R. § 41.20(b)(3). No other fees are believed to be due for this Reply Brief; however, should any such fee be due, authorization is hereby given to charge any additional fees necessary, and to credit any overpayments, to our deposit account no. 22-0261, referencing our docket no. 31921-169499.

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¹ The Table of Contents is included for reference purposes only and not to limit the issues to be reviewed on appeal.

I. *UPDATED STATEMENT OF RELATED APPEALS AND INTERFERENCES –*
37 C.F.R. § 41.37(c)(1)(ii)

As the Office is aware, the named real party in interest, Simplification, LLC (“Simplification”), filed a patent infringement action in the United States District Court for the District of Delaware against Block Financial Corporation (“Block”) on April 8, 2003, based on the patent at issue in reexamination control no. 90/006,713 (U.S. 6,202,052) (hereinafter “the ’052 patent”). Civil Action No. 03-355-JJF. Block filed this request for reexamination on July 11, 2003, which reexamination was granted by the Office on October 2, 2003. The parties filed a stipulation staying the case pending reexamination on November 21, 2003, the stay being granted on November 25, 2003. On July 31, 2007, in the reexamination, the Board of Patent Appeals and Interferences (BPAI) reversed the Examiner on all counts (Appeal No. 2007-0712). On June 9, 2008, the Office reopened prosecution and issued a new Office Action in Ex Parte Reexamination. Appellant submitted an Amendment and Reply in response to the Office Action on August 8, 2008.

The Office is also aware that Simplification filed a second patent infringement action against Block in the United States District Court for the District of Delaware on February 24, 2004, based on the patent at issue in the instant reexamination, U.S. patent 6,697,787 (hereinafter “the ’787 patent”), which issued from a continuation application of the ’052 patent. Civil Action No. 04-114-JJF. Block filed a request for reexamination of the ’787 patent on March 15, 2004, which reexamination was granted by the Office on June 3, 2004 as Reexam Control No. 90/006,969. The case was stayed pending reexamination on May 10, 2004. On July 31, 2007, in the reexamination, the BPAI reversed the Examiner on all counts (Appeal No. 2007-0518). On June 6, 2008, the Office reopened prosecution and issued a new Office Action in Ex Parte Reexamination. Appellant submitted an Amendment and Reply in response to the Office Action on August 6, 2008.

On October 31, 2007, a status hearing was held in the United States District Court for the District of Delaware. As a result of the status hearing, both of the foregoing litigation matters were resumed and consolidated. A trial date has been scheduled for February 9, 2009. A copy of the transcript of the hearing was submitted with the Appeal Brief. Subsequently, the court issued a Scheduling Order on December 7, 2007. A copy of the Scheduling Order was also submitted with the Appeal Brief. By stipulation of the parties, the date for filing claim construction briefs was extended to May 13, 2008. A copy of the stipulation was submitted with the Appeal Brief.

Simplification and Block filed Opening Briefs and Reply Briefs on Claim Construction on May 13 and May 29, 2008, respectively. Copies of Simplification's Opening and Reply Briefs are submitted herewith as Attachment G. Copies of Block's Opening and Reply Briefs are submitted herewith as Attachment H. Subsequently, on June 5, 2008, a Markman hearing was held in the United States District Court for the District of Delaware. A copy of the transcript of the hearing is submitted herewith as Attachment I.

Appellant also filed Application No. 10/782,977 on February 23, 2004, as a continuation application of Application No. 09/776,707, now the '787 patent. Application No. 10/782,977 was finally rejected on December 22, 2005, and is currently on appeal before the Board (Appeal No. 2008-0174), the Reply Brief having been filed on June 4, 2007. Appellant waived the right to an oral hearing on July 17, 2008.

Appellant also filed a divisional application, Application No. 10/978,430, from the instant application, on November 2, 2004. Application No. 10/978,430 was finally rejected on July 5, 2006, and is currently on appeal awaiting decision by the Board (Appeal No. 2007-4113), a waiver of hearing by Appellant having been filed on April 21, 2008.

As of October 6, 2008, the filing date of this Reply Brief, there are no other appeals, interferences or judicial proceedings known to the Appellant/Applicant or Appellant/Applicant's legal representatives that will directly affect or will be directly affected by or have bearing on the Board's decision in this appeal.

II. STATUS OF CLAIMS – 37 C.F.R. § 41.37(c)(1)(iii)

The status of the claims remains unchanged from the Appeal Brief. Pending claims 1-7, 11, 13, and 35-50 have been finally rejected, and are appealed. Claims 8-10, 12, and 14-34 remain canceled (*see* Amendments dated June 1, 2005, and June 29, 2006).

III. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL – 37 C.F.R. § 41.37(c)(1)(vi)

These Grounds of Rejection to be Reviewed on Appeal are the same as those set forth in the Appeal Brief and remain unchanged.

A. Whether claims 1, 2, 4-5, 7, 11, 13, 35-37, 39, and 41 are unpatentable under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,473,741 to Baker.

B. Whether claims 42, 44, 45, 47, 48, and 50 are unpatentable under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,473,741 to Baker.

C. Whether claims 6, 38, 40, 43, 46, and 49 are unpatentable under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,473,741 to Baker.

D. Whether claims 3, 6, 38, 40, 43, 46, and 49 are unpatentable under 35 U.S.C. § 103(a) over Baker, as applied to claims 2, 11, 13, 35, 42, 45, and 48 in the anticipation rejection, in view of Official Notice taken by the Examiner.

IV. ARGUMENT – 37 C.F.R. § 41.37(c)(1)(vii)

A. No New Grounds of Rejection Presented in the Examiner's Answer

The Examiner's Answer dated August 6, 2008, does not contain a rejection designated as a new ground of rejection nor does it appear to contain any undesignated new grounds of rejection. *See* M.P.E.P. §§ 1207.03(III)-(IV). Section (9) of the Examiner's Answer (pages 2-9), titled "Grounds of Rejection," is believed to recite, almost *verbatim*, the same grounds of rejection presented in the Final Office Action (pages 9-14) dated April 20, 2007.

Accordingly, the Appellant is not required to exercise the options set forth in 37 C.F.R. §§ 41.39(b)(1)-(2) to avoid *sua sponte* dismissal of the appeal as to claims subject to a new ground of rejection. Nonetheless, the Appellant requests that the appeal be maintained by the filing of this Reply Brief, which is submitted in accordance with 37 C.F.R. § 41.41. No new amendment, affidavits, or other evidence are submitted with this Reply Brief.

B. Response to Office's "Response to Argument"

In Section (10) of the Examiner's Answer (pages 9-20), the Office presents its "Response to Argument." A majority of the arguments set forth in the Examiner's Answer were previously presented (*verbatim*) in the Final Office Action and are believed to be fully addressed in the Appeal Brief. The following is a brief summary of the correlation between the purportedly responsive arguments presented in the Examiner's Answer and those presented in the Final Office Action:

- Ex. Ans., page 9, line 4 – page 10, line 17; page 12, line 17 – page 13, line 21 (*see* Final Office Action, page 2, line 8 – page 4, line 2)
- Ex. Ans., page 10, line 18 – page 12, line 2 (*see* Final Office Action, page 4, line 3 – page 5, line 10)
- Ex. Ans., page 17, line 3 – page 18, line 4 (*see* Final Office Action, page 5, line 11 – page 6, line 14)
- Ex. Ans., page 18, line 18 – page 20, line 19 (*see* Final Office Action, page 6, line 15 – page 8, line 16)

Nevertheless, the Examiner's Answer does appear to present at least three "new" (i.e., supplemental) arguments in response to the Appeal Brief. Accordingly, the Appellant traverses these "new" arguments for at least the following three reasons.

1. It Is *Unreasonable* To Consider Baker's "Individual Accounting And Tax Preparation Firms" To Be The Recited "Tax Data Provider"

First, the Appellant respectfully disagrees with the Office's continued insistence that the recited "tax data provider" can be broadly interpreted to include, for example, Baker's "individual accounting and tax preparation firms." *See* Ex. Ans. page 12, line 3 – page 13, line 21. In addition to the reasons cited in the Appeal Brief in support of this distinction (*see, e.g.,* Appeal Brief, Section VII(A)(1), page 16, line 5 – page 19, line 31), the Appellant maintains that it is *unreasonable* to consider Baker's "individual accounting and tax preparation firms" to be the recited "tax data provider" because such a broad interpretation is *inconsistent* with the disclosure.

During patent examination, claims must be given their "broadest *reasonable* construction 'in light of the specification as it would be interpreted by one of ordinary skill in the art.'" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 75 USPQ2d 1321, 1329 (Fed. Cir. 2005) (en banc) (citation omitted) (emphasis added); *see also* M.P.E.P. § 2111. Furthermore, "broadest reasonable interpretation" is understood to mean construing the words "in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in applicant's specification." *In re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027-28 (Fed. Cir. 1997). Although it is improper to import claim limitations from the specification, claims cannot be read in a vacuum. *See* M.P.E.P. § 2111.01. Thus, during examination, a broad interpretation of a claim term that is *inconsistent* with the specification would **not** be considered "reasonable."

According to page 9, lines 21-22 of the instant disclosure, "[t]he term 'tax data provider' refers to each party that has tax information relevant to the taxpayer's tax liability or tax reporting obligations." This definition is followed by a list of non-limiting examples which are not intended to limit the definition, but nonetheless serves to illuminate the type of party that might qualify as a "tax data provider." The term "taxpayer," on the other hand, is separately defined as "an individual or other entity, such as a trust, estate, corporation, or partnership, who has tax liability or must file a tax return." Page 9, lines 17-19. FIG. 2 also visually depicts the distinction between the taxpayer and several examples of the taxpayer's "tax data providers." Likewise, the disclosure separately recites "a tax return preparer institution" which may be, for example, "a professional tax preparation company, an accounting firm, or an individual accountant." Page 11, lines 10-11. Thus, each of these

entities is separately defined and discussed in the specification such that the taxpayer and/or the taxpayer's tax return preparer cannot reasonably be considered to be a "tax data provider." To conflate these entities within the context of the claims amounts to an unreasonable interpretation.

For example, there are several statements throughout the instant specification that would be rendered moot, or at least incomprehensible, if Baker's "individual accounting and tax preparation firms" are considered to be "tax data providers." Some examples, taken from the description of step 11 starting on page 9, line 16, are as follows:

- "In step 11, the taxpayer 20 provides the electronic intermediary 21 with information on tax data providers." Page 9, lines 16-17 (just before the terms "taxpayer" and "tax data provider" are separately defined.).
- "[T]he taxpayer could specifically identify the tax data providers and could include information on how to contact the tax data providers electronically" Page 10, lines 7-8.
- "Additionally, the taxpayer can provide the electronic intermediary with authorization to contact and receive information from the tax data providers." Page 10, lines 10-11.
- "The taxpayer can provide the electronic intermediary with the information on the tax data providers in a number of ways. For example, the electronic intermediary could prompt the taxpayer for the information, and the taxpayer could provide the information using an input means." Page 10, lines 16-19.
- "In the preferred embodiment of the invention, the taxpayer has control over the electronic intermediary. For example, the electronic intermediary could be a pre-packaged computer program embodied on a computer-readable medium available in a retail market. In this case, the taxpayer purchases the electronic intermediary from the retail market and installs the electronic intermediary on the taxpayer's general purpose computer. The taxpayer then provides the information on the tax data providers as well as other information to the electronic intermediary installed on the taxpayer's general purpose computer." Page 11, lines 1-8.
- "In an alternative embodiment of the present invention, the electronic intermediary is controlled by a tax return preparer institution, such as a professional tax preparation company, an accounting firm, or an individual accountant. In this embodiment, the tax return preparer is authorized by the taxpayer to collect, compute, prepare, and file the taxpayer's tax return, and to debit or credit the taxpayer's bank account for any tax liability or refund, respectively." Page 11, lines 9-13.
- "Because the tax return preparer controls the electronic intermediary in this alternative embodiment, the tax return preparer ensures that the electronic intermediary receives the appropriate information required, such as the electronic location of the tax data providers, and information to determine whether the taxpayer has a special tax case." Page 11, lines 19-23.

In view of the foregoing recitations, the Appellant reiterates that Baker's "individual accounting and tax preparation firms" cannot *reasonably* be considered to be a "tax data provider," as recited in at least claim 1.

The Examiner's Answer also seeks to improperly define the term "tax data provider" based on extrinsic evidence, specifically, Merriam Webster's Collegiate® Dictionary, 10th Ed. (see Ex. Ans., page 16, lines 8-14) despite substantial intrinsic evidence regarding the definition of this term. This is believed to directly contradict the holding in *Phillips v. AWH Corp.*, 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005) (en banc). In *Phillips*, the Federal Circuit cited Judge Rich's opinion in *Standard Oil Co. v. Am. Cyanamid Co.*, 774 F.2d 448, 452 (Fed. Cir. 1985), which stated that "[t]he specification is, thus, the primary basis for construing the claims." 415 F.3d at 1315, 75 USPQ2d at 1328. Expounding on this point, the en banc panel in *Phillips* also stated that "while extrinsic evidence 'can shed useful light on the relevant art,' . . . it is 'less significant than the intrinsic record in determining . . . the legally operative meaning of claim language.'" 415 F.3d at 1317, 75 USPQ2d at 1330 (citation omitted). "[H]eavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification." 415 F.3d at 1321, 75 USPQ2d at 1332. Thus, the Office's apparent reliance on a dictionary definition of the term "provide" to interpret the term "tax data provider" is believed to be improper.

In view of the foregoing, claim 1 is believed to be allowable over Baker. Claims 2, 4-7, and 35 depend from claim 1 and are submitted as being allowable over Baker for at least the same reasons. Claims 11 and 13 are directed to an apparatus and computer-readable medium embodying a computer program comprising code segments, respectively, and include recitations similar to that of claim 1. Accordingly, claims 11 and 13 are believed to be allowable over Baker for at least the same reasons. Claims 36, 38, and 39 depend from claim 11 and are submitted as being allowable over Baker for at least the same reasons. Claims 37, 40, and 41 depend from claim 13 and are submitted as being allowable over Baker for at least the same reasons. Reversal of the rejections is respectfully requested.

2. The Office's Responsive Argument Regarding Claims 42, 45, and 48 Misses the Point

Second, the Appellant respectfully submits that the Office's responsive argument regarding the scope of claims 42, 45, and 48 misses the point. In the Final Office Action, the Office asserted that the language in claims 42, 45, and 48 could be interpreted to allow an "intermediary" between the recited "tax information requestor" and "tax data provider." In response, the Appellant argued that the Office's interpretation of claims 42, 45, and 48 allowing such an "intermediary" was erroneous. *See* Appeal Brief, Section VII(A)(2), pages 20-22. In making this argument, the Appellant noted that the disclosure provided support for at least three "options" by which the tax information requestor could collect the electronic tax return and/or tax data. *See, e.g.,* Appeal Brief, page 21, lines 3-8. Therefore, in the context of the claims and the instant disclosure, the Appellant argued that one of ordinary skill in the art would understand that the "tax information requestor" and "tax data provider" expressly recited in the "connecting" and "collecting" steps of claims 42, 45, and 48 are connected to one another directly and not via an "intermediary."

In the Appeal Brief, the Appellant stated that "[c]laims 1, 11, and 13 clearly related to option (1)" (Appeal Brief, page 21, line 18) and that "[c]laims 42, 45, and 48 are clearly directed to option (2) above" (Appeal Brief, page 21, line 9). The Appellant respectfully agrees with the Office that none of claims 1, 11, 13, 42, 45, and 48 preclude the tax information requestor from connecting to, and collecting an electronic tax return and/or tax data from, both an electronic intermediary and a tax data provider. In other words, the Appellant agrees that claims 1, 11, and 13 can be interpreted to encompass both options (1) and (3), but respectfully submits that these claims cannot be interpreted to encompass option (2) alone. That is, the *express* language in claims 1, 11, and 13 cannot, for example, be reasonably construed to encompass only option (2) (i.e., the tax information requestor connecting to, and collecting an electronic tax return and/or tax data from, the tax data provider). Similarly, claims 42, 45, and 48 can be interpreted to encompass both options (2) and (3), but cannot be interpreted to encompass option (1) alone. In this regard, the *express* language in claims 42, 45, and 48 cannot, for example, be reasonably construed to encompass only option (1) (i.e., the tax information requestor connecting to, and collecting an electronic tax return and/or tax data from, an electronic intermediary, wherein the electronic tax return and/or tax data is electronically provided to the electronic intermediary by the tax data

provider). Based on the foregoing, it also logically follows that claims 35-37, which depend from claims 1, 11, and 13, respectively, are directed to option (3) (i.e., the tax information requestor electronically collecting electronic tax returns and/or tax data from both the electronic intermediary and the tax data provider).

In view of the foregoing, it is respectfully submitted that the Office's argument regarding the scope of claims 42, 45, and 48 misses the point. The Appellant's point in making this argument is that the express language of claims 42, 45, and 48 is directed to option (2) even though the open form of the claims allow coverage of option (3). Likewise, the express language of claims 1, 11, and 13 is directed to option (1) even though the open form of the claims allow coverage of option (3). In this regard, it is improper to read claims 42, 45, and 48 as allowing an "intermediary" between the "tax information requestor" and "tax data provider" in the *expressly* recited "connecting" and "collecting" steps. Accordingly, claims 42, 45, and 48 are believed to be allowable over Baker. Claims 43-44, 46-47, and 49-50 depend from one of claims 42, 45, and 48 and are submitted as being allowable over Baker for at least the same reasons. Reversal of the rejections is respectfully requested.

3. The Specific Taxpayer-Related Entities Recited in Claims 6, 38, 40, 43, 46, and 49 do, in Fact, "Affect the Structure and Functionality of the Claimed Invention"

Third, the Appellant continues to respectfully disagree with the Office's argument that the specific taxpayer-related entities recited in claims 6, 38, 40, 43, 46, and 49 do not "affect the structure and functionality of the claimed invention." In an apparent response to a portion of Appellant's argument on this point set forth in Section VII(A)(3) of the Appeal Brief, the Office states that:

[T]he implied legal obligations have no effect on the structural elements or manipulative steps of the invention within the currently recited claim scope. Understood legal obligations may be interpreted as nothing more than abstract contractual agreements. Unless such contractual details have direct bearing on the type of structural elements or special manipulative steps that are needed to process tax data (for example) within the currently recited metes and bounds of the claims, abstract contractual agreements will not patentably distinguish the claimed invention over the prior art

Ex. Answer, page 18, lines 9-16.

Although the relevance and reasoning of the foregoing argument are not easily discernible, the argument is believed to be in response to Appellant's statement that "the recited entities [in claims 6, 38, 40, 43, 46, and 49] are the source of the individual taxpayer's tax information, each having legal obligations separate and apart from the taxpayer to report, and assure the veracity of, the tax information of the taxpayer." Appeal Brief, Section VII(A)(3), page 23. Appellant's statement was made in support of the positions that the specific recited entities differ from Baker's "individual accounting and tax preparation firms" and that the positive recitation of these entities does, in fact, affect the structure and/or functionality of the claims. See Appeal Brief, Section VII(A)(3), page 24. More specifically, Appellant's statement was made as part of an argument in response to a statement in the Final Office Action that "[a]s far as the scope of the invention is concerned, whether a taxpayer, a tax preparer, an employer, . . . or a taxing authority provides the recited tax data, the recited manipulative steps are performed the same." Final Office Action, page 4, lines 15-19. As set forth in the Appeal Brief, it remains the Appellant's position that the express recitation of specific entities cannot be disregarded (i.e., given no patentable weight) in the way the foregoing statement would seem to imply. Each specific tax data provider is expressly recited as being directly related to the taxpayer (e.g., "said taxpayer's employer," etc.) and their recitation in the claims affects scope by dictating who or what provides the electronic tax return and/or tax data to the electronic intermediary or tax information requestor. Appellant's point that one of ordinary skill in the art would recognize that each of the recited entities has, in accordance with State and Federal statutory tax laws for example, legal obligations separate from the taxpayer to report tax information of the taxpayer, was only meant to provide a reason as to why these particular tax data providers would be the entities selected to provide the electronic tax return and/or tax data to the electronic intermediary or tax information requestor. In any event, statutory obligations under State and Federal law are not "abstract contractual agreements."

Accordingly, the Appellant maintains that the recitation of the various entities in claims 6, 38, 40, 43, 46, and 49 affects the scope of the claims by dictating who or what provides the electronic tax return and/or tax data to the electronic intermediary or tax information requestor. This clearly affects the "structure and/or functionality of the claims" and is patentably distinguishable from Baker.

In view of the foregoing, claims 6, 38, 40, 43, 46, and 49 are believed to be allowable over Baker. Reversal of the rejections is respectfully requested.

V. CONCLUSION

In summary, the Appellant respectfully requests reversal of the rejection of claims 1, 2, 4-7, 11, 13, and 35-50 under 35 U.S.C. § 102(e). The Appellant also respectfully requests reversal of the rejections of claims 3, 6, 38, 40, 43, 46, and 49 under 35 U.S.C. § 103(a).

Respectfully submitted,

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VI. *UPDATED RELATED PROCEEDINGS APPENDIX - 37 C.F.R. § 41.37(c)(1)(x)*

In Section I above, pursuant to 37 C.F.R. § 41.37(c)(1)(ii), the Appellant provided an updated statement identifying by application, patent, appeal or interference number all other prior and pending appeals, interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. Here, pursuant to 37 C.F.R. §§ 41.37(c)(1)(x), Applicant provides copies of documents filed with the court in the related litigation:

- **Attachment G** – Simplification's Opening and Reply Briefs
- **Attachment H** – Block's Opening and Reply Briefs
- **Attachment I** – Copy of the transcript of the June 5, 2008, Markman hearing held in the U. S. District Court for the District of Delaware